In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1233

GROVER C. CROWE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 12–13) is reported at 373 F. 2d 797.

JURISDICTION

The judgment of the court of appeals (Pet App. 11) was entered on March 9, 1967. The petition for a writ of certiorari was filed on April 7, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court abused its discretion in denying leave to withdraw a plea of guilty.

265-238—67

RULE INVOLVED

Rule 32(d) of the Federal Rules of Criminal Procedure provides:

> Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

STATEMENT

On April 27, 1964, in the United States District Court for the District of Delaware, petitioner pleaded guilty to one substantive count of a 32-count indictment charging conspiracy and substantive violations of the mail fraud statute (18 U.S.C. 1341). A sentence imposed on March 18, 1965, was ordered vacated on March 25 because the court, at the time of pronouncement, had inadvertently referred to the substantive count in question as a conspiracy charge. At the date set for resentencing, on April 26, 1965, petitioner moved to withdraw his plea of guilty. After a hearing on May 25 and 26, 1965, the motion was denied. On June 1, 1965, petitioner was sentenced, pursuant to 18 U.S.C. 4208(b), to imprisonment for five years subject to modification after a study prescribed by 18 U.S.C. 4208(c). The court of appeals affirmed *per curiam*.

The record shows that the indictment was returned on May 3, 1963, and that petitioner retained counsel, Mr. Ostrov, immediately thereafter (Tr. May 25, 1965,

p. 15). On July 30, 1963, petitioner entered a plea of not guilty. Trial was set for April 27, 1964. On April 23, 1964, petitioner appeared before the court with counsel for a pre-trial conference at which there was an extensive discussion of the construction of the indictment, the production of records, the character of the evidence and the defense and other matters (Tr. April 23, 1964).

On April 27, 1964, petitioner appeared with counsel who informed the court that petitioner desired leave to change his plea. The following transpired (Pet. 4–5):

> The COURT: You wish to withdraw your prior plea of not guilty to Count IX and to plead guilty to Count IX?
>
> Mr. OSTROV: That is correct.
>
> The COURT: Is that your desire also, Mr. Crowe?
>
> Defendant CROWE: Yes, sir.
>
> The COURT: Very well. I will have a presentence report made for my information and then there will be a date fixed for the imposition of sentence. * * *
>
> * * * * * *
>
> Mr. LOWICKI [Assistant United States Attorney]: In light of Mr. Crowe's changing his plea to Count IX, the Government sees no necessity or has no desire for pursuing the trial of the remaining counts and will dismiss those counts at sentencing.
>
> We also state at this time that it is our understanding that the change of plea is made without any promises on the part of the Government, any inducements, and that the plea is made freely and voluntarily by the defendant.

The COURT: Is that the fact?

Mr. OSTROV: That is the fact.

The COURT: And that is the fact, is it, Mr. Crowe?

Defendant CROWE. Yes.

On March 18, 1965, a hearing on sentencing was held at which Mr. Ostrov argued for leniency. He explained that petitioner, in selling at auction items obtained from suppliers upon the representation that they were to be used as premiums to promote his sewing machines business, did not attempt initially to defraud but that the bad business practice developed to the point that "it actually violated the statute" (App. p. 6b).[1] Petitioner's co-defendant testified that he and petitioner sold items at auction even though they represented to sellers that the items were to be given away as premiums (Tr. March 18, 1965, pp. 28–29). Petitioner admitted the auction sales and argued that his only mistake was in adopting this practice without notifying the suppliers (*ibid.*, pp. 12, 31–32). The court imposed a sentence of five years' imprisonment subject to modification after a study pursuant to 18 U.S.C. 4208(c), observing that, despite petitioner's protestations, he stood convicted of a serious crime and that his record showed that he had been identified over a long period of years with other business ventures causing substantial loss to the public (*ibid.*, pp. 32, 33). In that connection the court mistakenly referred to petitioner's conviction as for con-

[1] "App." refers to the appendix of the appellee in the court below.

spiracy rather than the substantive offense. Because of that fact, the sentence was vacated on March 25, 1965, and petitioner brougth back for resentencing on April 26, 1965.

At the hearing called for resentencing, petitioner appeared with new counsel, Mr. Bader, and applied for permission to withdraw the plea of guilty (Tr. April 26, 1965, p. 2). Mr. Bader said that he was satisfied that petitioner, "in the strict legal sense," entered the plea knowingly and willingly and that he had no contentions to make with respect to misunderstanding or inducement (*ibid.*, pp. 3, 9). He felt "rather certain," however, that the plea had been entered in light of an expectation, "transmitted" to petitioner by counsel for both sides, that a sentence of probation was probable (*ibid.*, p. 6). He explained that he had no reason to conclude that anyone had given petitioner an absolute assurance that he would get probation, but that his thinking was based upon the consideration that he, as an experienced attorney, would have told a defendant in similar circumstances that there was a strong probability of a suspended sentence (*ibid.*, pp. 7, 8). He believed that petitioner's feeling that he would receive a sentence of probation was a product of his own "wishful thinking and not of anything that he was told categorically" by his own attorney or government counsel (*ibid.*, p. 8), and that petitioner, with full knowledge of the possible penalties, had entered the plea for "practical reasons" having to do with the expense and strain attendant on a lengthy trial and the uncertainty of the outcome (*ibid.*, pp. 10–12). Petitioner expressly affirmed these representations by

counsel (*ibid.*, p. 15). The court requested that counsel file a formal motion with supporting affidavits and set the matter down for further hearing (*ibid.*, pp. 17, 18).

At a hearing held on May 25, 1965, Mr. Bader urged that the motion should be considered as one made prior to sentence in view of the court's vacation of initial sentence (Tr. May 25, 1965, p. 2). In support of the motion it was contended that the plea had been entered on the assurance of petitioner's counsel, Mr. Ostrov, that petitioner was "virtually certain" of receiving a suspended sentence, that the plea was prompted by practical considerations of the expense and uncertainties of a trial, and that petitioner was not guilty (*ibid.*, p. 3). Mr. Ostrov testified that petitioner entered the plea freely, with knowledge of what he was doing, and without promises or inducements from the government (*ibid.*, pp. 41–42, 49). Mr. Ostrov had thought such course advisable after evaluating all the circumstances of the case, his conversations with government counsel, his knowledge of petitioner's previous record, petitioner's financial condition and other factors (*ibid.*, p. 22). He had told petitioner that he thought there was a good possibility of a suspended sentence, but he did not say, or imply, that this was a certainty (*ibid.*, p. 54). On the contrary, he had advised petitioner of the hazards of such course, told him that sentence was solely in the province of the court, and that government counsel had indicated it would make no recommendation as to sentence (*ibid.*, pp. 22, 23). Assistant United States Attorney Lowicki had remarked to Mr. Ostrov that the sentencing court

had a great deal of compassion for defendants and that it was highly improbable that his client would go to jail (*ibid.*, p. 34).

Petitioner testified that he had never talked to government counsel except in the presence of his own counsel. In pleading guilty he had weighed all the possibilities and the final determination was his. He knew the matter of sentence was for the court and he had recognized the risk involved (*ibid.*, pp. 110–113). In explaining his admission to Mr. Ostrov that he was "technically guilty," he said that he had meant to convey the notion that he never intended fraud of any kind (*ibid.*, p. 110).

ARGUMENT

On this record, it is clear that petitioner's plea of guilty was knowingly entered after consultation with counsel, as the product of petitioner's reasoned choice, without any promises and with full knowledge on petitioner's part of his guilt of the offense with which he was charged. It is also clear that petitioner was in fact guilty; the mere claim of good faith could not alter the admitted fact that petitioner knew he sold at auction items which he represented were to be given away as premiums. Although the court treated the motion to withdraw the plea as one made before sentence, since the sentence first imposed had been vacated, it seems evident that the motion was prompted by petitioner's disappointment upon discovering that he would not be granted probation. At the time the plea was entered, almost a year before the first sentence, the government had been prepared

to go to trial with some fifty witnesses and numerous records (see Tr. April 26, 1965, p. 23). Under these circumstances, the denial of the motion was well within the discretion of the district court. *United States* v. *Ptomey,* 366 F. 2d 759 (C.A. 3); *United States* v. *Washington,* 341 F. 2d 277, 281 (C.A. 3), certiorari denied *sub nom. De Gregory* v. *United States,* 382 U.S. 850; *United States* v. *Hughes,* 325 F. 2d 789 (C.A. 2), certiorari denied, 377 U.S. 907; *Zaffarano* v. *United States,* 330 F. 2d 114 (C.A. 9), certiorari denied, 379 U.S. 825. See also *Nagelberg* v. *United States,* 377 U.S. 266.

Petitioner's present contention that his plea should have been vacated because the district court did not comply with Rule 11, F.R. Crim. P., is without merit. Petitioner had been present at a lengthy pre-trial conference at which the charges were fully discussed. When the guilty plea was subsequently entered petitioner had been represented by his retained counsel for almost a year. The court thus had good reason to believe that the plea had been fully discussed by petitioner and counsel, as indeed it had been; and petitioner signified to the court that the plea was his own desire. It was a matter of record that no promises had been made. The record at the hearing on the motion to withdraw the plea subsequently confirmed what was implicit on the original record—that the guilty plea was entered knowingly and voluntarily.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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